SUPREME COURT OF THE UNITED STATES.

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October Term, 1906.

No. 11, Original.

The State of Kansas, *Complainant,*

vs.

The United States of America, Ethan Allen Hitchcock, *Secretary of the Interior;* Francis E. Leupp, *Commissioner of Indian Affairs;* Tams Bixby, *Commissioner to the Five Civilized Tribes;* J. George Wright, *United States Indian Inspector for the Indian Territory;* Dana H. Kelsey, *United States Indian Agent for the Indians of the Union Agency in the Indian Territory;* The Muskogee or Creek Nation or Tribe of Indians, Pleasant Porter, *Principal Chief of the Muskogee or Creek Nation or Tribe of Indians;* William Fisher and Joseph Fisher, *Citizens and Residents of the State of Texas;* Cornelius L. Bonham, *Citizen and Resident of the State of Illinois;* Michael Fitzpatrick and Jennie C. Fitzpatrick, *Citizens and Residents of the State of Illinois;* George F. Roth, *Citizen and Resident of the State of Illinois;* Samuel Johnson and Elmer Johnson, *Citizens and Residents of the State of Missouri;* John F. Ingram, David Whitlow, George W. Grayson, Napoleon B. Moore, Conny Murphy, David A. Lee, Googan Sarty, James Childres, W. B. Rogers, Alexander L. Posey, Wm. N. Moore, Temiye Kernells, John Jefferson, Henry C.

REED, SAM. GRAYSON, GEORGE MALVERN, JAKE (A. J.) BERRYHILL, WATTEY YAHOLA, GEORGE MARSHALL, ROBERT BRUNER, SARAH A. ASBILL, and JAKE SMITH, *for Themselves and All Other Allottees of Land in the Muskogee or Creek Nation Whose Allotments in Whole or in Part are included within ever alternate section of land or parts thereof designated by odd numbers to the extent of ten sections per mile on each side of the Missouri, Kansas & Texas Railway and within twenty miles of the line of said road, and all persons holding under said allottees or any of them, Defendants.*

Brief of Complainant in Opposition to the Motion of Defendants to Dismiss.

The motion of defendants to dismiss for want of jurisdiction and their brief in support thereof are but a repetition of the printed suggestions which the United States filed in opposition to the motion of complainant for leave to file the bill. The suggestions of the United States in opposition to filing the bill and the printed answer of the complainant thereto were submitted to this court at its last term, and the court, after having considered the same, overruled the suggestions of the United States and directed writs to issue returnable to the October term, 1906, of this court.

While the suggestions were overruled and leave granted the complainant to file the bill and have process thereon, without prejudice, we submit that this court must have meant thereby that it would not pass upon the important jurisdictional questions in this case except upon final hearing. The jurisdictional questions suggested by the defendants in their motion to dismiss are too important to be decided simply upon printed motion and printed briefs, without oral argument and the fullest consideration.

It is a sufficient answer to the motion of defendants to dismiss that the State of Kansas claims by its bill to be the owner of the legal title and to have the right to maintain the suit against all the defendants, including the United States, for the reasons set forth in the bill. This claim cannot be met by a motion to dismiss, but must be met by either plea, answer, or demurrer, for in that way only can the State have an opportunity of a full hearing and consideration upon the merits with the right of oral argument. The State has the right to a hearing of this question upon the merits according to the principles of the rules of equity, which require that the plea, demurrer, or answer be set down for hearing and argument. (See rules governing the equity practice, 31 to 39.)

In *Sparrow v. Strong,* 3 Wall., 105, this court said that it had repeatedly held that, on motion to dismiss, the court will look to the regularity of the writ of error and the fact of the jurisdiction. Other questions must in general await final hearing.

In *Semple v. Hagar,* 4 Wall., 433, this court said:

> "In many cases the question of jurisdiction is so involved with other questions decided in the case, that this court cannot eliminate it without the examination of a voluminous record and passing on the whole merits of the case. In such instances, the court will reserve the question of jurisdiction until the case is heard on the final arguments on the merits."

In *Blythe v. Hinckley,* 180 U. S., 337, this court said, on motion to dismiss for lack of jurisdiction, that the grounds for jurisdiction, if good on their face, though not well founded, were sufficient and could not be inquired into on a motion to dismiss, and the court denied the motion to dismiss for want of jurisdiction.

In *Morning Star v. Cunningham,* 110 Ind., 328, it is held that an answer that, as to some of the plaintiffs, the action ought to abate because they have no interest in the cause of

action, is not a good plea in abatement; that matters of that kind go to the merits and must be determined on final hearing.

In *Ruddock v. Gordon*, Quincy (Mass.), 38, it is held that the want of power in a collector of taxes to maintain an action to recover them is not matter of abatement, but should be tried on the merits. The rule seems to be well established that the incapacity of the plaintiff to sue cannot be raised by motion to dismiss, but by a special plea in abatement. (See American Digest, vol. 1, sections 148 and 154.)

I.

The first proposition made by the motion to dismiss is that the State of Kansas has no substantial interest in the suit, and therefore cannot be a party plaintiff within the meaning of the Constitution, article III, section 2. Against this proposition we claim that the legal title to the lands granted is by the terms of the granting acts, July 25, 1866 (Bill, pp. 21 to 27, inclusive), and July 26, 1866 (Bill, pp. 28 to 33, inclusive), vested in the State of Kansas for the use and benefit of the Missouri, Kansas and Texas Railway Company by relation from the date of the grant, and that this legal title of the State of Kansas to the granted lands in the Indian Territory has never been divested and is now vested in the State of Kansas.

At page 5 of the brief of defendants in support of their motion to dismiss, it is claimed that "by the terms of the granting act the legal title passed to the railroad company at the date of the grant, or, at least, upon the construction of the road." We claim that the grants were *in præsenti*, to the State of Kansas for the use and benefit of the railway company, effective from the date of the grants, and attached, when the road was constructed, to the particular lands in controversy, and that by the doctrine of relation the legal title of the State dates from the grants.

The bill of complaint, at page 33, states our position as follows:

> "Your oratrix further shows that in the administration of the land grants made to the State of Kansas (for the use and benefit of the Missouri, Kansas & Texas Railway Company) * * * the grants of the lands in place were at all times held to be grants *in præsenti*, conveying the fee simple title as from the date thereof to the State of Kansas as trustee * * * and such construction * * * has been uniformly upheld by the courts of the United States whenever brought in question, and so your oratrix claims and avers that the grant of lands through the Indian Territory, including the Creek Nation, was a grant *in præsenti* of the fee simple title to said granted lands comprising the odd sections within the twenty mile limit on either side of the railroad as located and constructed, to the State of Kansas for the use and benefit of said Missouri, Kansas & Texas Railway Company."

The land grants to the State of Kansas for the use and benefit of the Missouri, Kansas & Texas Railway Company, so far as they have been received and are now claimed, extended from Junction City, on the Kansas Pacific Railway, now Union Pacific Railway, in Geary county, Kansas, to a point on the Kansas and Indian Territory dividing line in Labette county, Kansas; thence across the Indian Territory to the Texas line, near Preston, now Denison, Texas. That part of the road from Emporia to the crossing of the Leavenworth, Lawrence and Fort Gibson Railway, now Atchison, Topeka & Santa Fe Railway, near Chanute, in Neosho county, was received under the act of March 3, 1863, and that part of the line from Emporia north to Junction City under the act of July 1, 1864, and that part from Chanute to the northern line of the Indian Territory, near Chetopa, in Labette county, Kansas, under the act of July 26, 1866.

In Kansas City, Lawrence and South Kansas Railroad Company *v.* The Attorney General, 118 U. S., 682, this

court held that the acts of March 3, 1863, July 1, 1864, and July 26, 1866, were to be construed as one act, and the entire land grants in Kansas to the State of Kansas for the use and benefit of the Missouri, Kansas and Texas Railway Company were comprised in those three acts, construed *in pari materia* as one act. The lands claimed by the State of Kansas in the Indian Territory for the use and benefit of the Missouri, Kansas and Texas Railway Company are claimed under the act of July 25, 1866, and not of July 26, 1866. The motion of defendants seems to misunderstand the claim of the State of Kansas, for it quotes from the act of July 26, 1866, as the origin of the legal title of the State of Kansas, instead of from the act of July 25, 1866. We will explain now, so that the counsel for the defendants and the court may understand the claim of the State of Kansas. It appears from the bill, but not quite as succinctly as from this statement.

At or about the time of the land-grant acts of 1866 there were three Kansas railroad companies running through the State to the Indian Territory line. The first was the Union Pacific Railway Company, Southern branch, since the Missouri, Kansas and Texas Railway Company, extending from Fort Riley, now Junction City, Kansas, in a southeasterly direction, down the valley of the Neosho river, to the southern line of the State of Kansas, near Chetopa, Kansas; the second was the Leavenworth, Lawrence and Fort Gibson Railway Company, since conveyed to the Atchison, Topeka and Santa Fe R. R. Co., extending from Leavenworth, through Lawrence, to the northern line of the Indian Territory, near Coffeyville, Montgomery county, Kansas, in the direction of Galveston bay, in Texas; and the third was the Kansas and Neosho Valley Railway Company, since the Kansas City, Fort Scott and Memphis, and now a part of the St. Louis and San Francisco Railroad Co., extending from a point of connection with the Union Pacific Railroad at or near the mouth of the Kansas river; thence south-

easterly, through the eastern tier of counties, to the northern line of the Indian Territory, at or near Baxter Springs, in Cherokee county, Kansas. The act of July 25, 1866, was entitled,

> "An act granting lands to the State of Kansas to aid in the construction of the Kansas and Neosho Valley Railroad and its extension to Red river."

After granting to the State of Kansas lands in Kansas for the use and benefit of that railroad company (section1), and authorizing it to build across the Indian Territory to the northern line of Texas near Preston, now Denison (section 2), and granting lands through the Indian Territory (sections 8 and 9), that act, in section 11, among other things, provided "that should the Leavenworth, Lawrence and Fort Gibson "Railway Company, or the Union Pacific Railroad Company, "Southern branch (since the Missouri, Kansas and Texas "Railway Company) construct and complete its road to that "point on the southern boundary of the State of Kansas where "the line of said Kansas and Neosho Valley Railroad shall "cross the same, before the said Kansas and Neosho Valley "Railroad Company shall have constructed and completed "its said road to said point, then and in that event the com-"pany so first reaching in completion the said point on the "southern boundary of the State of Kansas shall be author-"ized, upon obtaining the written approval of the President "of the United States, to construct and operate its line of "railroad from said point to a point at or near Preston, in "the State of Texas, with grants of land according to the "provisions of this act, but upon the further special con-"dition, nevertheless, that said railroad company shall have "commenced in good faith the construction thereof before "the said Kansas & Neosho Valley Railroad Company shall "have completed its said railroad to said point: *And pro-"vided further,* That said other railroad company, so having "commenced said work in good faith, shall continue to

" prosecute the same with sufficient energy to insure the com-
" pletion of the same within a reasonable time, subject to
" the approval of the President of the United States."

There was a race between these three companies as to which should first reach the northern line of the Indian Territory, and the Union Pacific Railroad Company, Southern branch, now the Missouri, Kansas and Texas Railway Company, succeeded in the race, obtained the written approval of the President as being entitled to build under said act of Congress across the Indian Territory, and did build across the Indian Territory, and the same was approved by the President of the United States, and the other companies never attempted to build any railroad or thereafter made any claim to the land grants in the Indian Territory provided by said act of July 25, 1866. The history of this race and the action of the Department of the Interior and of the President and Commissioners thereunder are set out in full in the bill, pages 38 to 89, inclusive.

Section 1 of the act of July 25, 1866, grants the lands to the State of Kansas for the use and benefit of the railway company, to the extent of ten sections per mile on each side of the road, and it is a grant *in præsenti*, in that it uses the express terms, "There is hereby granted to the State of Kansas," and, further, if the road was not built in ten years, the lands shall "revert to the United States."

Section 3 of the act provides:

> " * * * When the governor of the State of Kansas shall certify that any section of ten consecutive miles of said road is completed in a good, substantial, and workmanlike manner as a first class railroad, then the said Secretary of the Interior shall issue to the said company patents for so many sections of the lands within the limits above named as are coterminous with said completed section hereinbefore granted; and when certificates of the governor aforesaid shall be presented to said Secretary, of the completion, aforesaid, of each successive section of ten consecutive miles of said road, the said Secretary shall

in like manner issue to said company patents for the land for each of said sections of road as in the first instance, until said road shall be completed: *Provided,* That, if said road is not completed within ten years from the date of the acceptance of the grant hereinbefore made, the lands remaining unpatented shall revert to the United States: *And provided further,* That the said lands shall not, in any manner, be disposed of or incumbered by said company or its assigns, except as the same are patented under the provisions of this act."

Section 8 of the act authorizes and empowers the company extend and construct its railroad from the southern ındary of Kansas south, through the Indian Territory, to d river, at or near Preston, in the State of Texas, so as to ınect with the railway "now being constructed from Galton to a point at or near Preston, in said State."

Section 9 provides:

"*And be it further enacted,* That the same grants of lands through said Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act. *Provided,* That said lands become a part of the public lands of the United States."

The reason why section 11 of the act of July 25, 1866, nsferred the right to build, under the act, across the lian Territory to that one of the three companies first ching the Indian Territory line was that the Indian naıs had only granted a right of way to one road, which uld be authorized by Congress to construct a railroad from y point north to any point south through said nations. ee Bill, pp. 34 and 35, and specially article V of the Creek aty with the United States, approved by the Senate July 1866; signed by the delegates of the Creek nation July

23, 1866, and proclaimed by the President August 11, 1866; Bill, pp. 170, 171, 178, 179, 180, 181.)

And, further, Congress did not intend to multiply land grants in the Indian Territory, but to confine the north and south line to one company.

The act of July 26, 1866, was entitled:

> "An act granting Lands to the State of Kansas to aid in the construction of a Southern Branch of the Union Pacific Railway and Telegraph from Fort Riley, Kansas, to Fort Smith, Arkansas."

These two acts were passed only a day apart, and the language is the same in each, except as to the routes.

Section 1 of the act of July 26, 1866 (Bill, pp. 28 to 33, inclusive) granted lands in the State of Kansas for the use and benefit of the Union Pacific Railroad Company, Southern branch, since Missouri, Kansas and Texas Railway Company, through the State of Kansas.

Section 8 authorized the extension from the southern boundary of Kansas south through the Indian Territory, along the valley of the Grand and Arkansas rivers, to Fort Smith, in the State of Arkansas.

Section 9 is as follows:

> "*And be it further enacted*, That the same grant of lands through said Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted by the first section of this act: *Provided*, That said lands shall become part of the public lands of the United States."

Section 11 of both the acts of July 25 and July 26, 1866, provided that the company might connect, unite, and consolidate with any other railroad company, after the same shall be located in the valley of the Neosho or Grand river, upon just, fair, and equitable terms to be agreed upon be-

tween the parties, and shall not be against the public interest or the interest of the United States (Bill, pp. 26 to 33, inclusive), thus showing that there was in contemplation one line through the Indian Territory.

The object of the land grants of Congress to the State of Kansas, referred to in the bill as the acts of March 3, 1863, July 1, 1864, July 25, 1866, and July 26, 1866, was to serve the high purposes of both the United States and the State of Kansas; and these land-grant acts were not only grants, but also laws. The parties to the grants were the United States, the State of Kansas as trustee for the use and benefit of the railway company, and the railway company itself. The specific object of the United States was to have railroads built, extending through Kansas and thence across the Indian Territory, connecting with the Union Pacific Railroad system, which was then building from Kansas City, Missouri, and Omaha, Nebraska, westward across the continent, and to secure a military and post route to transport its troops, munitions of war, supplies, and public stores free (Bill, sec. 3, p. 23), and its mails for such compensation as Congress might by law provide (Bill, sec. 5, p. 24). It also undoubtedly had in view the general development of the country. The State of Kansas had a like public object in having railroads built, to develop the State, and to have its railroads extend beyond the limits of the State, connecting the State with other States in distant parts of the country, to cross the Indian Territory, reach Texas and the Gulf of Mexico at Galveston, and the Republic of Mexico, in the southwestern part of the continent. The United States selected the State of Kansas as the trustee to hold the title to the land grants; the State of Kansas accepted the trust, and the company availed itself of the land grants by building the railroads. How idle and senseless, therefore, is the suggestion, in the brief of counsel for the defendants, that it was not competent for Kansas to be a trustee except for railroads lying within the limits of the State. It is too firmly settled to be questioned, that the

United States and each one of the separate States may sustain the character of trustee, and that they have the legal capacities to take and execute trusts for every purpose.

Perry on Trusts, sec. 41.
McDonald *v.* Murdock, 15 How., 400.
U. S. *v.* Michigan, 190 U. S., 379.
Van Wyck *v.* Knevals, 106 U. S., 360, *et seq.*

The Federal Government is now trustee in the will of James Smithson in behalf of the Smithsonian Institute. Nearly all of the States are trustees of lands for educational purposes. In nearly if not all of the States and Territories wherein lands have been granted in aid of railroad companies the State has been made by the United States the trustee of the lands granted for the use and benefit of the railroad companies. In the case at bar it is the duty of the State of Kansas, as trustee for the railway company, to defend, uphold, and protect the title which was granted to it and see that the lands go to the beneficiary of the trust. The brief of defendants, evidently relying very slightly on the inability of Kansas to be the trustee, claims that by the terms of section 3 of the act of July 25, 1866, the legal title passed to the railroad company upon the construction of the road. Section 1 of the act relates to lands in Kansas. Section 3 provides that when the governor of Kansas shall certify that any section of ten consecutive miles of the road is completed the Secretary of the Interior shall issue to the company patents for so many sections of the land granted within the limits "above named"—that is, within the limits named in section 1.

Section 9 provides that the "same grant of lands through the Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: *Provided*, That said lands become a part of the public lands of the

United States." Nothing is said in the ninth section about the third section.

By section 8 of the act the right of way through the Indian Territory is granted directly to the railway company; but by section 9 the lands are granted (as in section 1 thereof) to the State of Kansas for the purpose of aiding the railway company.

It is manifest that the Secretary of the Interior could not "issue patents to the company" for lands in the Indian Territory merely upon the certificate of the governor of Kansas that ten miles of road had been completed in the Indian Territory. It would be necessary for the Secretary to be informed not only of the fact of completion of the ten miles, but of the extinguishment of the Indian title. As the provisions of section 3 are absolute and unconditional, they cannot reasonably be considered to relate to the grant contained in section 9.

Moreover, it is plain, from an examination of the entire act, that Congress, when it enacted section 3, had in mind the lands situated in the State of Kansas.

However, if section 3 should be held to apply to the grant of lands in the Indian Territory provided for in section 9, it does not in any way affect the proposition that by section 1 and section 9 the legal title to the lands in the Indian Territory passed by the grant to the State of Kansas for the use and benefit of the railway company, and that legal title has never passed out of the State of Kansas.

It was expressly ruled in Van Wyck *v.* Knevals, 106 U. S., 360, that the legal title passed to the State under a precisely similar statute, and was a grant *in præsenti*, and that section 3 was not necessary to pass the title to the State, for it passed by granting clauses of section 1. Section 3 was simply the means provided for passing the legal title from the State to the railway company and to identify and more clearly attach the grants to the specific lands.

The ruling in Van Wyck *v.* Knevals was as follows (p. 364):

> "The grant is similar in its main features to numerous other grants of land made by Congress in aid of railroads, and contains the same limitations, or, rather, exceptions to it. It differs from some of the grants in that it is made to the State, and not directly to the company to be benefited. The act of Congress, however, provides, notwithstanding the designation of the State as grantee, that patents for the land shall be issued directly to the company upon the completion of every ten consecutive miles of the road. The grant is of ten alternate sections, designated by odd numbers, on each side of the proposed road, subject to the condition that if it appear, when the route of the road is 'definitely fixed,' that the United States have sold any section or a part thereof, or the right of pre-emption or homestead settlement has attached, or the same has been reserved by the United States for any purpose, the Secretary of the Interior shall cause an equal quantity of other lands to be selected from odd sections nearest those designated, in lieu of the lands appropriated, which shall be held by the State for the same purpose. The grant is one *in præsenti*, except as its operation is affected by that condition; that is, it imports the transfer, subject to the limitations mentioned, of a present interest in the lands designated. The difficulty in immediately giving full operation to it arises from the fact that the sections designated as granted are incapable of identification until the route of the road is 'definitely fixed.' When that route is thus established the grant takes effect upon the sections by relation as of the date of the act of Congress. In that sense we say that the grant is one *in præsenti*. It cuts off all claims other than those mentioned, to any portion of the lands from the date of the act, and passes the title as fully as though the sections had then been capable of identification. Nor is this operation of the grant affected by the fact that patents of the United States are subsequently, upon the certificate of the governor, to be issued by the Secretary of

> the Interior directly to the company and not to the State. This is only a mode of divesting the State of her trust character and of passing the legal title held by her to the party for whose benefit the grant was made. The legal title under the grant goes to the State, but the equitable right vests in the company. The State cannot dispose of the lands; she simply holds them for the use and benefit of the company, the act of Congress providing how her trust shall be discharged and the legal title be conveyed to the company."

No patent has issued to the railway company, and hence the legal title conveyed by the granting act to the State still remains in the State. The State of Kansas is hence the indispensable party complainant and can pray the demanded relief.

The case of Van Wyck *v.* Knevals, *supra*, is thus direct authority in favor of the proposition that the title to the granted lands is vested in the State of Kansas, for the land grant there construed is in practically the same words as sections 1 and 3 of the land grant of 1866 to the State of Kansas for the use of the railway company.

In St. Paul & Pacific R. R. Co. *v.* Northern Pacific R. R. Co., 139 U. S., 1, the words "that there be and hereby is granted to the Northern Pacific Railroad Company" was held to be a grant *in præsenti*, and passed the title direct to the railroad company, although by the fourth section of that act of Congress it was provided that patents should be issued to the company as the road was constructed in 25-mile sections. This is a very strong case in our favor, as the court observed that it was necessary to place that construction upon such acts in order to carry out the purposes of the Government, "and to secure the company against any attempted alienation of the land to other parties."

Among other things, the court said (pp. 5, 6, 7):

"As seen by the terms of the third section of the act, the grant is one *in præsenti;* that is, it purports to pass a present title to the lands designated by alternate sections, subject to such exceptions and reservations as may arise from sale, grant, pre-emption or other disposition previous to the time the definite route of the road is fixed. The language of the statute is 'that there be, and hereby is, granted' to the company every alternate section of the lands designated, which implies that the property itself is passed, not any special or limited interest in it. The words also import a transfer of a present title, not a promise to transfer one in the future.

"The route not being at the time determined, the grant was in the nature of a float, and the title did not attach to any specific sections until they were capable of identification; but when once identified the title attached to them as of the date of the grant, except as to such sections as were specifically reserved. It is in this sense that the grant is termed one *in præsenti;* that is to say it is of that character as to all lands within the terms of the grant, and not reserved from it at the time of the definite location of the route.

"This is the construction given to similar grants by this court, where the question has been often considered; indeed, it is so well settled as to be no longer open to discussion (Schulenberg *v.* Harriman, 21 Wall., 44, 60; Leavenworth, Lawrence, etc., Railroad Co. *v.* United States, 92 U. S., 733; Missouri, Kansas, etc., Railway Co. *v.* Kansas Pacific Railway Co., 97 U. S., 491; Railroad Co. *v.* Baldwin, 103 U. S., 426). The terms of present grant are in some cases qualified by other portions of the granting act, as in the case of Rice *v.* Railroad Co., 1 Black, 358; but unless qualified they are to receive the interpretation mentioned.

"It is contended that they are qualified, and restricted by the provision of the fourth section that whenever twenty-five miles of the road are completed in a good, substantial, and workmanlike manner, and the commissioners appointed to examine the same have made a report to that effect to the President, patents shall be issued 'confirming to said company the right and title to said lands, situated opposite to and

coterminous with, said completed section of said road.' This provision, it is urged, is inconsistent with the theory that a title to the lands had previously vested in the company. We do not think so. There are many reasons why patents should be issued upon the completion of each section of the road. They would not only identify the lands as coterminous with the completed section but they would be evidence that, as to that portion of the road, the conditions of the grant had been complied with, and that it was thus freed from any liability to forfeiture for a disregard of them. They would also obviate the necessity of any further evidence of the grantee's title. As deed of further assurance they would thus be of great value in giving quiet and peace to the grantee's possession. There are many instances in the legislation of Congress where patents are authorized to be issued to parties in further assurance of their title, notwithstanding a previous legislative grant to them or a legislative confirmation of a previously existing claim. The previous grant or confirmation is in no respect impaired thereby, or its construction affected. (See on this point Langdeau *v.* Hanes, 21 Wall., 521; Wright *v.* Roseberry, 121 U. S., 488, 497.)

"Although the restraints in the act against the sale or alienation of the lands when once identified are not the subject of consideration in the present case, it may be well, to obviate misapprehension, to observe that the company, notwithstanding its possession of the title, was not at liberty to dispose of the lands without the consent of Congress, except as each twenty-five mile section was completed and accepted by the President, so as to deprive the United States of the right to compel their application to the purposes of the grant, or so as to prevent their forfeiture in case of the company's failure to comply with its conditions. Congress in allowing a mortgage upon the land, and in other ways, may have granted permission to the company to use and dispose of the lands or a portion thereof, but with this we are not now concerned. The construction we give to the granting terms of the act, as qualified by subsequent provisions, not only secures the application of the

> property to the construction of the road and telegraph line, and thus carries out the purposes of the Government, but also secures the company against any attempted alienation of the land to other parties."

There is no federal statute of uses, nor is there any federal common law. The lands in question are not situated in Kansas or any other State. Under the decisions of the courts, both English and American, the statute of uses was never held to execute the trust or pass the legal title to the *cestui que trust* where the trust created was such that it was necessary that the trustee should continue to hold the legal title in order to carry out and effectuate the purposes of the trust. The statute of uses has never been considered to execute the trust where the trust was created for the express purpose of preserving a contingent remainder.

Perry on Trusts, sections 305 and 309.
Biscoe *v.* Perkins, 1 Ves. & B., 485.
Barker *v.* Greenwood, 4 M. & W., 431.
Vanderheyden *v.* Crandall, 2 Denio., 9.
Laurens *v.* Jenney, 1 Spears, 365; Co. Litt., 265 a. 2, 337 a. n. 2.

In the case at bar the Government was the owner in fee simple of the lands in question. It granted to the Indian tribes a communal tribal interest for and during such time as they should live upon it in common as a tribe. The fee was granted to the State of Kansas in trust, to preserve it for the railway company when the conditions as specified in the act of Congress should be fulfilled. The question whether or not the conditions have been performed upon which the railway company is entitled to the lands and to have the trust executed and the legal title vested in it is a question for the court. If this court shall decide, or if counsel for the Government will consent that the court enter a judgment finding and adjudging that the conditions have been performed, then the railway com-

pany, as *cestui que trust*, may become absolutely entitled to the beneficial interest in the trust estate. In section 520, Perry on Trusts, cited by counsel for the Government, it is said that, even as applied to a simple or dry trustee, it is his duty to protect and defend the title, or to allow his name to be used for that purpose, and that at law he is the legal owner of the estate and his name must be used in all suits at law affecting the legal title, and the author, in the same section, further says that in these simple or dry trusts the beneficiary cannot call for a conveyance if the conveyance is inconsistent with all the agreements or purposes of the trust.

The act of July 25, 1866, was not only a grant of the lands to the State of Kansas, but it is also a law, and the only law of this case, and that law, as gathered from the four corners of the act of Congress, governs the grant, and not the technical rules of the common law nor the statute of uses.

That the statute is not only a grant, but the law of the case, see—

Schulenberg *v.* Harriman, 21 Wall., 44.

And in *Missouri, Kansas & Texas Railway Company v. Kansas Pacific Railway Company* (97 U. S., 491, 497) it was said:

> "It is always to be borne in mind, in construing a congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress. That intent should not be defeated by applying to the grant the rules of the common law, which are properly applicable only to transfers between private parties. To the validity of such transfers it may be admitted that there must exist a present power of identification of the land; and that where no such power exists, instruments, with words of present grant, are operative, if at all, only as contracts to convey. But the rules of the common law must yield in this, as in all other cases, to the legislative will."

That the provisions of section 3, even though they apply to the lands in the Indian Territory, in no way affect the grant to the State, is determined by—

Van Wyck *v.* Knevals, 106 U. S., 360-364.
St. Paul & Pac. R. R. *v.* Northern Pac. R. R., 139 U. S., 1.
Langdeau *v.* Hanes, 21 Wal., 521.
Wright *v.* Roseberry, 121 U. S., 488.

Counsel for defendants go outside of the record to assert, on page 6 of their brief, that in a mortgage dated November 14, 1868, on file in the General Land Office, a recital is made that the State of Kansas accepted said grant from Congress and regranted the same to the party of the first part. There is no reference to this mortgage in the bill, and it is not and cannot now be before the court. If the court is to send out and examine that record, it will find that the recitals in the mortgage in no way make any statement that the lands granted in the Indian Territory have been regranted by the State to the railway company. There never has been any regrant of them. At the time the mortgage was made it had not been determined that the Missouri, Kansas and Texas Railway Company, formerly Union Pacific Railroad Company, Southern branch, was entitled to build across the Indian Territory under the act of July 25, 1866, for at that time it had not reached the southern boundary line of Kansas, and it had not been decided by the President that it was the company entitled to build the railroad. The only way that the legal title could be gotten out of the State of Kansas would be either by a direct conveyance by the State to the railway company or by patents of the Secretary of the Interior to the railway company based on the certificate of the governor of Kansas, or perhaps the decision of the President, that the railroad had been constructed as provided by the act. The whole bill shows that patents have never been granted by the Secretary of the Interior, because the United

States denies the right of the State of Kansas or the railway company to the lands in the Indian Territory. In order to establish that the lands granted to the State of Kansas have been regranted to the railway company, it would have to affirmatively show that either this conveyance by the State had been made or that the Secretary of the Interior, on the faith of the governor's certificate, or the President's decision, had patented the lands direct to the railway company. The State of Kansas avers, speaking for the State and for the governor of the State and the authorities of the State, that the road was built through the Indian Territory within the time and in conformity with the requirements of the statute and approved by the President of the United States, and that notwithstanding, the claim of the State of Kansas to the legal title and of the railway company to the beneficial title has been denied and ignored by the United States, and that the United States has sought to convey this title to others than the State of Kansas or the railway company.

The case of Rice *v.* R. R. Co., 1st Black, 358, is cited as an authority in support of the Government's contention that the State of Kansas acquired nothing under the act of Congress but a mere naked trust or power to dispose of the lands in the manner therein specified, and that Congress could at any time after the passage of the act have repealed the same, and we believe the further proposition is insidiously asserted that Congress has the power, directly or indirectly, to repeal the act.

An examination of the case of Rice *v.* R. R. Co. shows that there are no facts in common between that case and the case at bar, but the case is really a strong authority in support of complainant's right to maintain its bill as applied to the facts of this case. In the Rice case the railroad company was incorporated by the territorial legislature of Minnesota on the 4th day of March, 1854, with power to construct a railroad from the northern line of the State of Iowa to Lake Superior. The territorial charter also provided "that

all such lands and privileges belonging, or which may hereafter belong to the Territory or future State of Minnesota on or within said 200 feet in width, are hereby granted to said corporation for said purposes, and for no other, and for the purpose of aiding said company in the construction and maintaining of said railroad, it is further enacted that any lands which may be granted to the said Territory to aid in the construction of said railroad are, and the same are hereby granted in fee simple absolute, without any further act or deed."

Congress, on the 29th day of June, 1854, passed an act entitled "An act to aid the Territory of Minnesota in the construction of a railroad therein," and among other things granted lands to the Territory of Minnesota to aid in the construction of a line of railroad from the southern line of said territory; thence, by way of St. Paul, to the eastern line of said Territory, in the direction of Lake Superior, but by the provisions of said act of Congress the benefits thereof were not to inure to the benefit of any company theretofore constituted and organized, and by section 4 of the act it was provided that no title should vest in the Territory of Minnesota, nor should any patent issue for any part of the lands until a continuous line of twenty miles of road should be completed.

Afterwards, on the 16th day of February, 1855, the Territory of Minnesota made some modifications and amendments to the charter of the railroad company and re-enacted it. The railroad company located its line across a tract of land claimed by the plaintiff, and which the plaintiff purchased from the Government on the 1st of January, 1856. The trespass complained of was the going on part of the land claimed by the plaintiff and cutting timber for the purpose of constructing the road. The railroad claimed title to the land in question by virtue of the act of the Territory of Minnesota granting to it any lands which Congress might thereafter grant to the Territory of Minnesota. The Su-

preme Court held that the territorial act, attempting to grant the title to land the fee to which was not then vested in it, was inoperative and void, and further held that the act of Congress did not inure to the benefit of the defendant railway company, because it was organized before the passage of the act; and that inasmuch as the act specifically provided that title should not vest in the Territory of Minnesota until a continuous line of twenty miles of railroad should be built, no such vested interest passed to the Territory of Minnesota, and that Congress could, intervening the construction of any railroad entitled to the benefits of the act, repeal the act. The court expressly held that the granting words were sufficient to vest in the Territory a beneficial interest in the lands granted except for the qualifying provisions in the act. The court said:

> "Undoubtedly the words employed are sufficient to have that effect (vest in the Territory a beneficial interest) and if not limited or restricted by the context of other parts of the act, they would probably receive that construction."

To the suggestion of the defendant railroad company that if the views of the plaintiff be adopted by the court, the same rule would apply to all the grants made by Congress to the States and other Territories, the court said:

> "Of course, the suggestion is correct if such other grants are made in the same terms and are subject to the same limitations, restrictions and prohibitions, but we have looked into that subject and think it proper to say that we see no foundation whatever for the suggestion."

In the act of July 25, 1866, now before this court, the grant to the State of Kansas was made *in præsenti*, without reservation, restriction, or limitation, and, as stated by Mr. Justice Clifford, who wrote the opinion of the court, "Undoubtedly the words employed are sufficient to have that

effect if not limited or restricted by the context or other parts of the act, and they should properly receive that construction." On the facts of our case, we contend that this is a strong authority in support of the bill.

Counsel for the Government admit and cite authorities to the effect that a conveyance to trustees for certain purposes carried the legal estate to the beneficiaries "unless there are duties imposed on the trustees, the performance of which requires the legal estate to be vested in them in which they would take an estate commensurate with the exigencies of their trust." We respectfully submit the exigencies of this situation clearly require the vestings of the estate in a trustee, pending the performance of things required by the acts of Congress. It would certainly be preposterous to contend that a conveyance to a trustee for the benefit of a person upon condition vests title in the beneficiary before condition performed.

In this connection certain statutes of Kansas, as well as decisions of the Supreme Court of Kansas, are also cited. It has been decided by this court that rules of decision in cases within the 34th section of the judiciary act were derived from the laws of the States, but in the construction of the laws of Congress, the rules of the common law furnish the true guide (Charles River Bridge *v.* Warren Bridge, 11th Peters, 345).

In the case of Sioux City, etc., R. R. *v.* U. S., 159 U. S., 349, relied upon by counsel for defendants as supporting the proposition that in the case at bar the title to the lands is in the railway company and not in the State of Kansas, the facts were: Congress, by an act approved May 12, 1864, granted certain lands to the State of Iowa in aid of the construction of railroads in that State (13 Stat. at Large, 872). The aid was granted for the construction of two railroads, one from Sioux City to the south line of Minnesota, and the other for a railroad extending from South McGregor, Iowa, in a westerly direction. The act provided that "the lands hereby granted should be disposed of by said State

for the purposes aforesaid only, and in manner following, namely, when the governor of said State has certified to the Secretary of the Interior that any section of ten consecutive miles of either of said roads is completed in a good, substantial and workmanlike manner, as a first-class railroad, then the Secretary of the Interior shall issue to the State patents for one hundred sections of land for the benefit of the road having completed the ten consecutive miles, as aforesaid;" and the said act provided that if the road was not completed within ten years the said lands hereby granted and not patented shall revert to the State of Iowa for the purpose of securing the completion of the roads within such time, not to exceed five years; and provided further that said lands should not be disposed of or encumbered in any manner except as the same were patented under the provisions of the act, and that if the State should fail to complete said road within five years after the ten years, then the lands undisposed of should revert to the United States.

By an act of the legislature of the State of Iowa approved April 20, 1866, it was provided that the lands, powers, duties, and trusts conferred by the act of Congress of July 12, 1864, were accepted by the State, and that "whenever any lands shall be patented to the State of Iowa, in accordance with the provisions of said act of Congress, said lands shall be held by the State, in trust, for the benefit of the railroad company entitled to the same, by virtue of said act of Congress, and be deeded to said railroad company, as shall be ordered by the legislature of the State of Iowa."

The Sioux City Railroad Company constructed its line from the southern boundary line of Minnesota, in the direction of Sioux City, a distance of 56.13 miles. The governor certified to the Secretary of the Interior the completion of the five 10-mile sections of the road, and the Secretary of the Interior issued patents to the State of Iowa for 407,910 acres, whereas patents should only have been issued for 320,000 acres, and the State in turn conveyed to the company 322,412

acres, and subsequently the legislature of Iowa passed an act directing the governor to certify to the Sioux City Railway Company, in accordance with the provisions of the act of its legislature of April 20, 1866, "any and all lands then held in trust for its benefit," but the remaining 85,457 acres, which had been patented by the Secretary of the Interior to the State, were never in fact conveyed by the State to the railroad company, as the railroad company had never constructed the additional mileage calling for the same. The Sioux City Company did not complete its line to Sioux City and the legislature of Iowa passed an act on March 15, 1882, declaring that all lands granted or intended to be granted to the Sioux City Company by the act of Congress, or by the acts of the legislature of Iowa, which had not been earned, "be and the same are hereby absolutely and entirely resumed by the State of Iowa," and on the 27th of March, 1884, the State of Iowa passed another act by which it relinquished and conveyed to the United States all lands resumed and intended to be resumed by the act of March 16, 1882.

Suit was brought by the United States against the Sioux City road, pursuant to the act of Congress of March 3, 1887, for the adjustment of land grants in aid of the construction of railroads and for the forfeiture of unearned lands. The Sioux City Company, while admitting that it had not completed its railroad, contended that it had not received the full quota of lands to which it was entitled for the line actually constructed, inasmuch as there were certain deficiencies in some of the sections along the constructed line.

Upon this state of facts the court held, that as the lands granted to the State could only be devoted to the construction of the railroad provided for in the act, the State held the legal title in trust for that purpose, and that as to the undisposed of lands, while the legal title was in the State, the Government was equitably entitled thereto. The railroad company contended that under the act of Congress granting the lands to the State, as well as under the patents of the

Government to the State, the legal title passed directly to the railroad company, and that the lands were thereby free from restraints of alienation, from conditions subsequent, or from liability to forfeiture; but this court held that neither the act of Congress granting the lands to the State in trust, nor the patents, carried any title directly to the railway company, but that the legal title remained in the State on and for the specific trust specified in the act of Congress, and that until the State disposed of the lands, the title was in it as trustee, and not in the railroad company; citing Schulenberg *v.* Harriman, 21 Wal., 44; Lake Superior Ship Canal, etc., Co. *v.* Cunningham, 155 U. S., 372; McGregor, etc., R. R. *v.* Brown, 39 Iowa, 655, and Sioux City & St. Paul R. R. *v.* Osceola County, 43 Iowa, 318.

We respectfully submit that this case, instead of supporting the contention of counsel for the Government, is a clear authority against the proposition that the legal title to the lands in question is in the railroad company and not in the State of Kansas. There has been no patent issued by the Government to the railroad company nor conveyances made by the State of Kansas to the railroad company. The title is now where it was placed by the act of Congress of July 25, 1866, in the State of Kansas.

The case of *Webster v. Cooper*, 14 Howard, 488, cited on page 5 of the brief of counsel for the Government in support of the proposition that conveyance to trustees for certain purposes or uses carries the legal title to the beneficiaries, is the construction of a will in which the testator devised certain lands to trustees and their heirs to the use of Richard Vassall for life, remainder for his life, in case of forfeiture, to the trustees to preserve contingent remainders; remainder to the sons of Richard Vassall, if any, as tenants in common in tail, with cross-remainders; remainder to Richard Vassall's daughter Elizabeth for life, remainder to trustees to preserve contingent remainders during her life; remainder to the sons of Elizabeth Vassall in tail. The court held that the rule in

Shelly's case was not applicable to the devise in question, but that it was plain from the terms of the will that it was not intended that the trustees should hold the fee, because there were express limitations of life estates to them to preserve contingent remainders, which would have been wholly inoperative if they took the fee.

The facts in the case were these: Florentius Vassall by his will devised certain lands to three trustees upon the trusts and for the uses above stated. The plaintiff claimed under the following provision of the will: "and from and immediately after the decease of said Elizabeth Vassall to the one or all and every the son and sons of the said Elizabeth Vassall," the question being whether, by force of the will, the plaintiff, being a son of Elizabeth Vassall, took any, and if any, what legal estate in the lands on the decease of his mother, Elizabeth Vassall, it being contended by the defendant that the trustees took the legal title in fee simple, and that the estates limited to Richard Vassall for life and to the others by way of remainders were only equitable estates, and consequently the plaintiff could not maintain the action. The court simply ruled that the legal estate was not vested in the trustees, but in the beneficiaries named in the will. We fail to see in what particular or particulars this case has any bearing on the questions before this court.

In *Schulenberg and others v. Harriman,* 21 Wallace, 44, it was held that under the act of Congress approved June 3, 1856, entitled, "An act granting public lands to the State of Wisconsin to aid in the construction of railroads in said State" (11 Statutes at Large, 20), that the grant was *in præsenti* and passed title to the odd sections, to be afterwards located, to the State, and when the route of the road was subsequently located, the title acquired precision and attached to the land. The act provided that if the road should not be constructed within ten years, no further sale should be made and the lands unsold should revert to the United States. The State accepted the grant and assumed the execution of the trust.

It further appears that after the granting of the lands to the State of Wisconsin the State passed an act accepting the grant and, in the words of the court, "assumed the execution of the trust," and that the legislature of Wisconsin passed an act transferring the title to the lands covered by the act to the St. Croix and Superior Railroad Company, in which act it was provided that on the construction and completion of every twenty miles of railway the said company should acquire the fee simple absolute in and to that portion of the lands granted to the State by act of Congress, appertaining to the portion of the railway so constructed. The plaintiff cut a lot of logs off of the lands in question, and the agent of the State seized the logs on the ground that the title to the lands and the logs was in the State.

The court further held that unless there were clauses in the statute restraining the operation of words of present grant they must be taken in their natural sense to import an immediate transfer of the title, although subsequent proceedings may be required to give precision to that title and attach it to specific tracts. It was contended in the argument of the case that under the decision of Rice *v.* R. R. Co. 1 Black, 358, 376, title did not pass to the State. The route of the road was surveyed and a map showing location filed at Washington, but the railroad was never actually constructed. Mr. Justice Field wrote the opinion of the court, and held that the words "that there be and is hereby granted to the State of Wisconsin" passed a present estate, and that this interpretation was much strengthened by the third section, where it was declared that the lands "hereby granted to said State shall be subject to the disposal of the legislature thereof," and the fourth section, which provided that if the road was not completed within ten years, no further sales should be made, "and the lands unsold shall revert to the United States;" and that these phrases implied what the first section in terms declares, that the grant is made, that is, that the title was transferred to the State. Justice Field

further said that the decisions fairly established the conclusion that unless there are other clauses in the statute restraining the operation of words of present grant, they must be taken in their natural sense to import an immediate transfer of title, and pointed out the distinction between such grants and mere conveyances at common law between individuals, observing that a grant from one individual to another of lands to be afterwards designated was a mere contract to convey, but that a legislative grant operates as a law as well as a transfer of the property. He distinguished the case of Rice *v.* R. R. Co. on the ground that the words of present grant in the first section were restrained by the provision in the subsequent section declaring that the title should not vest in the Territory of Minnesota until the road or portions of it were built.

In U. S. *v.* Southern Pacific Ry. Co., 146 U. S., 570, the court held that the words "there be and hereby is granted" operated as a grant *in præsenti*, citing St. Paul & Pacific R. R. Co. *v.* Northern Pacific R. R. Co., 139 U. S., 1; Schulenberg *v.* Harriman, 21 Wallace, 44; Leavenworth, Lawrence, etc., R. R. Co. *v.* United States, 92 U. S., 733; Missouri, Kansas, etc., R. R. Co. *v.* Kansas Pacific R. R. Co., 97 U. S., 491; R. R. Co. *v.* Baldwin, 103 U. S., 426.

In *Van Wyck v. Knevals*, 106 U. S., 360, *et seq.*, it was held that under an act of Congress granting lands in Kansas and Nebraska to the State of Kansas in trust for a Kansas railway company, the State took the legal title to the lands in Nebraska as well as in Kansas; and this case clearly settles the proposition that it was competent for the State to be a trustee and hold the legal title to lands beyond the limits of Kansas, and also that Congress intended by the act of July 25, 1866, under which the State of Kansas claims in this case, to vest the legal title in the State to the granted lands in the Indian Territory. The act of Congress construed in the Van Wyck case was passed by the same Congress and in the same month at the act of July 25, 1866. As

at the time of the passage of the act of July 25, 1866, it was uncertain which of the three roads named in section 11 of the act would first construct its line to the southern boundary line of the State of Kansas, it is manifestly absurd to contend that the land grant was direct to any one or all three of the companies named, but the grant was one *in præsenti* to the State of Kansas for the use and benefit of the railroad company which should first construct its line to the southern boundary line of the State of Kansas and secure the written approval of the President of the United States to construct and operate its line through the Indian Territory. That it was a grant to the State of Kansas there can be no question, for in no other way could the purpose and intention of Congress be carried out. No one of these railway companies contending for the prize of the land grant through the Indian Territory would have constructed its line from the State of Kansas through the Indian Territory on the bare promise that Congress would afterwards make the grant to the State of Kansas for its benefit. The title to the lands granted through the Indian Territory could not be suspended. The title, after the passage of the act, was either in the Government or in the State of Kansas. The title did not and could not have passed to any one of the railroad companies, because it was not known and could not be known for some time afterwards which one would become entitled to it. There was no organized territorial government in the Indian Territory in which the title could have vested as trustee.

II.

In reply to the brief of counsel for the defendants on their motion to dismiss, on the ground that this court has no jurisdiction of the defendants, we submit:

First. That this is a case where the State is a party plaintiff, and the suit is a case in equity arising under the Constitution of the United States, the laws of the United States, and

treaties made. The subject-matter of the suit is the title to lands, which originates exclusively under an act of Congress, and also under treaties made between the United States and the Creek nation. The State of Kansas claims to have the legal title to the lands by direct grant from the United States. The beneficiary of the trust, the railway company, has done everything required by the act of Congress. The defendants claim, as affirmatively shown by the bill, that the lands in question have been granted by the United States, since the grant to the State of Kansas, by certain treaties made between the United States and the Creek nation and certain laws of the United States, to individual allottees, to whom deeds or patents have been made by the United States and the Creek nation. The suit is one of conflicting titles, each party claiming under the Constitution, laws, and treaties of the United States. The case of *Minnesota v. Hitchcock,* 185 U. S., 373, is not an authority against the right to bring this suit under section 2, article III, of the Constitution of the United States, but, by clear implication, is a decision in favor of the right to bring the suit. This court, in the Minnesota case, based the jurisdiction upon that suit being against the United States, but it clearly said, on page 383, that jurisdiction did exist in all cases at law and in equity arising under the Constitution, the laws of the United States, and treaties made or which shall be made under their authority, where a State was a party, and in that part of the opinion quoted at page 13 of the brief of counsel for defendants the court added the following significant sentence, which the brief of counsel omits, and which is necessary to a full understanding of what is quoted:

> "To this it may be replied that this court cannot deny its jurisdiction in a case to which it is extended by the Constitution."

Instead of deciding, in the Minnesota case, that the court could not entertain jurisdiction because it was not a suit arising under the Constitution, laws of the United States or

treaties made, it clearly refrained from making that decision, and said, in the course of the opinion:

> "We omit as unnecessary to the disposition of this case any consideration of the applicability of the first two clauses, because we think the case comes within the third clause, and we need not now go further. This is a controversy to which the United States may be regarded as a party. It is one, therefore, to which the judicial power of the United States extends. It is, of course, under that clause, a matter of indifference whether the United States is a party plaintiff or defendant. It could not fairly be adjudged that the judicial power of the United States extends to cases in which the United States is a party plaintiff and does not extend to those cases in which it is a party defendant."

All that was decided in the case respecting the jurisdiction on the ground of citizenship was that the Secretary of the Interior, who was described as a citizen of Missouri, and the Commissioner of the Land Office, who was described as a citizen of Oregon, stood for the United States, and really made the United States a party defendant, and that the citizenship of these officials—they having no personal interest whatever in the matter—did not make the suit one of a State against citizens of other States.

Second. We submit, further, that the suit at bar, being by the State of Kansas against citizens of other States, is one within the jurisdiction of this court as a suit by a State against citizens of another State. The proposition that some of the defendants are citizens of the Territory, and therefore cannot be sued under the clause of the constitution giving jurisdiction over a suit by a State against the citizens of another, at most could only defeat the jurisdiction as to those defendants who are citizens of the Territory, and would not defeat the jurisdiction as to those defendants who are citizens of other States, of which there are many. If this proposition as made by the Government is true, then it would only result

in defeating the jurisdiction of this court as to the Indian Territory citizens, without affecting its jurisdiction over the vendees of the allottees, who are citizens of other States.

But the Government's contention is unsound. The jurisdiction of this court in this cause is founded upon *subject-matter, i. e.,* "arising under this Constitution, the laws of "the United States, and treaties made * * * under "their authority" (art. III, sec. 2). The succeeding provision, giving original jurisdiction in this court to cases "in "which a State shall be party," is hence *not* limited by any question of individual citizenship of any defendants. The provision of art. III, sec. 2, extending federal jurisdiction to cases "between a State and citizen of another State," is *an additional* ground of jurisdiction and extends to controversies between a State and citizens of another State not arising under the Constitution or laws or treaties of the United States. In other words, it is jurisdiction of *parties* in any justiciable case wholly apart from *subject-matter.* The cases cited to support the Government's contention all involve individual litigants and are hence manifestly inapplicable here.

III.

This suit of the State of Kansas against the United States can be maintained in this court under the original jurisdiction clause of the Constitution, upon the authority of *United States v. Texas* (143 U. S., 621) and *United States v. Michigan* (190 U. S., 379). The Texas and Michigan cases were suits brought by the United States against those States respectively. The suit now brought by the State of Kansas is the converse, the only difference being that the State is plaintiff and the United States defendant.

The doctrine of the Texas case, and likewise that of the Michigan case, is that the rule that the Government cannot be sued without its consent does not apply to suits between

overeigns. The State of Kansas is a sovereign. The United States is also a sovereign.

The Texas case declares (p. 645) the broad ground that "it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent," but immediately adds:

> "The question as to the suability of one government by another government rests upon wholly different grounds. Texas is not called to the bar of this court at the suit of an individual, but at the suit of the government established for the common and equal benefit of the people of all the States. The submission to judicial solution of controversies arising between these two governments, 'each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other,' *McCulloch v. State of Maryland*, 4 Wheat., 316, 400, 410, but both subject to the supreme law of the land, does no violence to the inherent nature of sovereignty. The States of the Union have agreed, in the Constitution, that the judicial power of the United States shall extend to *all* cases arising under the Constitution, laws and treaties of the United States, without regard to the character of the parties, (excluding, of course, suits against a State by its own citizens or by citizens of other States, or by citizens or subjects of foreign States,) and equally to controversies to which the United States shall be a party, without regard to the subject of such controversies, and that this court may exercise original jurisdiction in all such cases, 'in which a State shall be a party,' without excluding those in which the United States may be the opposite party. The exercise, therefore, by this court, of such original jurisdiction in a suit brought by one State against another to determine the boundary line between them, or in a suit brought by the United States against a State to determine the boundary between a Territory of the United States and that State, so far from infringing, in either case, upon the sovereignty, is with the consent of the State sued. Such consent

> was given by Texas when admitted into the Union upon an equal footing in all respects with the other States."

The fundamental basis for this conclusion is that in *this court* controversies between sovereigns—Federal or State—involving justiciable cause stand for original hearing and judgment in this court.

The Constitution does not in express terms confer upon the United States the power to thus appear as party plaintiff in an original suit in this court against a State. And the dissenting opinion in the Texas case (p. 649) stands broadly upon the express letter of the Constitution in this regard.

When, then, the Constitution is interpreted to confer this right of original action upon the United States, the reasoning which leads to that result manifestly applies in present instance; for in the Texas case the opinion cites with approval the observations of Mr. Justice Story, declaring the sovereign right of the United States to sue in its own courts and denying that such rights must be enforced in the State tribunals.

Indeed, the opinion in the Texas case adds the pertinent suggestion that if the rule were otherwise the United States must therefore sue in one of the courts of Texas. Hence, upon the very theory of the decision in the Texas case, it is manifest that Kansas, having a justiciable case against the United States, and the Constitution conferring original jurisdiction in all cases arising under the Constitution, laws, and treaties of the United States "in which a State shall be a party," must of necessity include all cases of such Federal nature wherein the State has justiciable interest. Otherwise the State would be wholly without remedy. If the United States had not sought judicial determination of the controversy with the State of Texas, the State would, in such view, have been without judicial remedy, for the United States would not be suable by the State.

The principle is admirably reasoned in the Texas case.

That immunity from suit by the sovereign, except with its consent, applies only in respect of individuals and not to controversies between the sovereigns leads, *ex necessitate,* to the conclusion that in all controversies of a Federal nature, wherein the State is a party, original suit may be brought in this court, summoning to its bar the United States, precisely as under converse conditions the United States may thus summon in the sovereign State.

In other words, the interpretation of the Constitution, which opens the door of original jurisdiction in this court to the United States against the State, must equally operate under converse conditions, or equality of sovereignty in this regard disappears.

The Constitution of the United States is the Constitution of all the States speaking in a united sense, and this court, as the Supreme Court of the United States, is also, in the same sense, the Supreme Court for all the United States, having original jurisdiction in all cases of Federal cognizance "in which a State shall be a party." The language of the Constitution in this respect is broad and unqualified. Hence, we submit, the door does not here open to the United States against the State and close against the State when the United States is sought to be made defendant.

And this clear conclusion is well expressed in the suit of *Minnesota v. Hitchcock, supra,* thus:

> "It could not fairly be adjudged that the judicial power of the United States extends to cases in which the United States is a party plaintiff and does not extend to those cases in which it is a party defendant."

It is well settled that the sovereignty of the State within its sphere is of the same quality and absolutely equal with the sovereignty of the United States within its sphere. The grant of judicial power under the Constitution extends "to controversies to which the United States shall be a party; to controversies between two or more States," and likewise pro-

vides that "in all cases * * * in which a State shall be a party, the Supreme Court shall have original jurisdiction."

A construction of this great instrument which permits the United States to sue a State in this court ought not, we submit, upon plain principle, to be narrowed in order to *exclude* the State, under like conditions, from invoking the same jurisdiction.

For the United States to hold, through its courts, that it can sue a sovereign State without its consent, and yet cannot be sued in its own courts by that State would show an absence of governmental chivalry, governmental comity, and governmental courtesy. Does not a decision laying down the rule that the United States can sue a State necessarily imply, as between the United States and the State, it consents to be sued by the State? Is it gracious or reasonable for the United States to hold, through its courts, that it can sue one of the States without its consent and then say that it cannot be sued by a State in the United States courts? The fact of holding in favor of the right of the United States to sue the States, as in the Texas and Michigan cases, we submit, necessarily and reasonably implies the consent of the United States in turn to be sued by the States in the United States courts. The question we here present was not alluded to, suggested or decided in the Minnesota and Oregon cases. Had Texas or Michigan been the plaintiff in the cases brought against them, instead of the United States, would not this court have decided that the suits could have been maintained by these States? We assert that the States could have maintained those suits on the same grounds that the United States was permitted to maintain them.

Moreover, if the element of express consent by the United States to be thus sued is essential, it may be forcibly suggested that such consent has been given to individuals to thus sue the United States in all cases at law, in equity, or admiralty, not sounding in tort, by the act of March 3, 1887 (24 Stats., p. 505).

Under that act (known as the "Tucker act") the Court of

Claims is given jurisdiction to hear and determine all claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of the Executive Department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the parties would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable.

By section 2 of this act the district courts of the United States are given concurrent jurisdiction with the Court of Claims as to all matters named in the first section where the amount of the claim does not exceed $1,000.00, and the circuit courts of the United States concurrent jurisdiction in all cases where the amount of such claim exceeds $1,000.00 and does not exceed $10,000.00.

Under these statutes and the Constitution of the United States, we claim that the Government has not only impliedly but expressly given its consent to be sued in a case where a State is a party, in the Supreme Court of the United States. It has been held that suits may be instituted in the territorial district court against the Government under these sections, although such territorial courts are not named in the act, under Revised Statutes, section 1910, which provides that each of the district courts in the Territory shall have and exercise the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States.

United States v. Forman, 5 Okla., 237.

Johnson v. United States, 6 Utah, 403.

In the case last cited, an appeal was taken to the Supreme Court of the United States by the United States, but was dismissed by the consent of the Attorney General (see *United States v. Johnson*, 140 U. S., 703).

The mere circumstance that such suits may be brought in the Court of Claims or, within restricted jurisdictional

amounts, in the circuit and district courts does not, we submit, alter the ultimate *fact* that the United States has recognized the principle that in all cases *ex contractu* it may be thus sued. Can it hence be properly said that a State must be driven to these inferior tribunals as party plaintiff against the United States in the presence of the provision of the Constitution which declares that, in all cases of Federal cognizance wherein the State is a party, original suit may be brought in this court? To so rule is to declare that the sovereignty of the State in such a case ranks only with the privilege of the private individual in all suits against the United States. On principle, and with manifest propriety, it may well be urged that recognition of the obligation of the United States to respond as defendant in suits *ex contractu* may well be held to include the suit of the sovereign State in this court where money recovery is so sought in the alternative.

In *Minnesota v. Hitchcock*, 185 U. S., 387, this court held that the United States was the real party in interest and the real party to be affected by the judgment, and ruled that inasmuch as the Government was a party in interest this court had original jurisdiction, and that the United States had impliedly given its consent to stand as party defendant. This implication was based upon a statute of March 2, 1901, which provides that in any suit instituted in the Supreme Court of the United States to determine the right of a State to what are commonly known as school lands, within any Indian reservation or any Indian cession, where an Indian tribe claims any right to or interest in the lands in controversy, or any disposition thereof by the United States, the right of such State may be fully tested and determined without making the Indian tribe or any portion thereof a party to the suit, if the Secretary of the Interior is made a party thereto, and the duty of representing and defending the right or interest of the Indian tribe or any portion thereof in the matter shall devolve upon the Attorney General upon request of such Secretary. It will be seen that this statute

does not, in express words, provide for any suit against the Government of the United States, or that it shall stand as the responsible party in the event of a determination of such a suit against any claim made by the Indians.

If, under the act of March 2, 1901, Congress impliedly gives its consent to be sued, then, by parity of reasoning, it is manifestly clear that in the case at bar, under the terms of the provisions of the Court of Claims act and the Constitution of the United States, this court has original jurisdiction by reason of the Government being a party in interest and has not only impliedly but expressly given its consent to be sued where a State is a party plaintiff. In brief of counsel for the Government the claim is expressly made that the Government is the real party in interest and has not only undertaken to defend on behalf of the Indians, but, under the act of Congress of June 28, 1898, the United States is the real party in interest and obligated to defend on behalf of the Indians.

We are well aware of the decision recently rendered in State of Oregon *v.* Hitchcock, Secretary of the Interior, and Richards, Commissioner of the General Land Office (202 U. S., 60), wherein, upon demurrer, the bill was dismissed. But we submit the decision therein is not here in point, because:

(1.) The only defendants in that case were the United States officials, whereas the Indians were necessary parties, and the decision so holds.

(2.) The bill sought injunctive relief in preventing transfer of the title of the United States to Indian allottees in respect of lands claimed by the State under a prior grant. No money relief was asked, whereas in the present case, in final analysis, the alternative relief here sought against the United States is a money decree if the primary prayer of the bill establishing title in the State is denied.

(3.) In the Oregon case the title to the land was and is still in the United States, and the decision clearly holds that this court will not interfere while the executive branch of the Government is administering the matter—a doctrine fully settled by many prior and cited cases.

The suggestion that the original jurisdiction of this court in respect of suits "in which a State shall be a party" is further limited also to suits where another State is defendant or citizens of another State are defendants is not applicable here, because:

(1.) The jurisdiction arises by reason of subject-matter, as we submit has been clearly shown *supra*.

(2.) Parties are made defendants by the bill, not officers of the United States nor residents of the Indian Territory, but citizens of the States of Texas, Illinois, and Missouri, who are sued by name and as grantees of specific Indian allottees (bill, pp. 2, 14, 15).

Hence we submit the suit is one between the State as plaintiff and citizens of *other* States as defendants.

The case of *New Hampshire v. Louisiana*, 108 U. S., 76, cited on opposing brief, is not applicable here. There, by general statute, the State had invited its citizens holding obligations against other States to assign them to the State, and upon deposit of estimated cost of the litigation the attorney general of such assignee State was authorized to bring suit in the name of the State in this court against the debtor State. The purpose of such proceeding was clearly to avoid the effect of the eleventh amendment to the Constitution. The State in such instance had no original interest in the subject-matter, had assumed no original duty as trustee, and was in no sense an original party to the controversy. The distinction between the case thus cited and the present is so manifest that further comment is unnecessary.

In the case of *South Dakota v. North Carolina*, 192 U. S., 286, it was held by this court that where the State had a direct interest against another State it could maintain an

original suit in this jurisdiction. In the case at bar the State was the original party to the grant from the United States, and the grant of the lands was to it direct as trustee, and hence Kansas is in no sense an intruding party.

The brief of counsel for the Government in support of the motion to dismiss, as well as its brief heretofore considered by this court, containing suggestions in opposition to the motion for leave to file the bill, claim that this suit is against the United States; that the United States is under an obligation to defend the allottees in their titles, and is expressly required by statute to defend such titles.

Under section 441 of the Revised Statutes the Secretary of the Interior is charged with the supervision of public business relating, among others, to the Indians and the public lands.

And under section 463, Revised Statutes, the Commissioner of Indian Affairs is required, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, to have the management of all Indian affairs and of all matters arising out of Indian relations.

The bill in this case, pages 15, 16, alleges:

> "Your oratrix further shows that the defendant the Creek nation, and the defendant Pleasant Porter, as principal chief of said nation, are charged by law and the usages and customs of the Creek nation with the duty of defending the title to the said allotted lands, and in pursuance of that duty have requested the defendant Hitchcock, the Secretary of the Interior, and Francis E. Leupp, United States Indian Commissioner, for and on behalf of the United States, to defend the title of said lands to said allottees and those claiming under them, and that the Secretary of the Interior and the United States Indian Commissioner claim that they are charged by law with the duty, and have charged themselves with the duty, of defending the titles, of the said allottees against your oratrix, notwithstanding the prior express grant of said lands to your oratrix, and accordingly the Secretary of the Interior has requested the Attorney-General of the

> United States to defend all suits involving the titles of the allottees of said lands, and the Department of Justice, acting through the Attorney-General, has charged itself with the duty of defending the titles of the allottees to said lands against your oratrix."

The case of the *State of Oregon against Hitchcock*, 202 U. S., page 60, *et seq.*, only decided that in that particular case the State could not sue the Secretary of the Interior and Commissioner of the General Land Office, in the absence of an act of Congress waiving immunity of the United States, or consenting that it be sued in respect to the swamp lands there in question. This decision was made upon the authorities which hold that the courts cannot enjoin the administration of land grants where the title is still in the United States. There the title was in the United States, while in the case at bar the title, according to the allegations of the bill, has passed out of the United States and is in the State of Kansas as the trustee for the railway company.

The power of the Secretary of the Interior and the Land Department, respecting these lands, has ceased, and the State of Kansas seeks to assert its title to the land. Its claim for money relief is based upon the idea that the United States has attempted to convey these lands, which belong to the State, to other parties, and having conveyed the lands of the State to other parties, if such conveyance is for any reason held to be effectual so as to pass title to the allottees, then the United States is responsible to the State of Kansas for the money value of the lands.

So, we have a case here where the United States has attempted to convey lands belonging to the State of Kansas to individual allottees; is under an obligation to defend the title of the allottees, and when the State asserts title to those lands, comes forward and actually defends, and is under an obligation to defend, as it claims, the title of the allottees. In such case the United States, as the warrantor asserting title for its grantees, the allottees, is properly a defendant.

Under this state of facts, we claim the irresistible inference to be that, under the law as it stands and as it is interpreted and administered by the Department of the Interior and the Judicial Department of the United States, the United States has given its consent to be sued, just as effectually as if it had done so by express words.

The United States is here now, defending for the Indian allottees and their grantees. In every forum in which the allottees will be threatened with the claim of the State of Kansas, the United States will be found asserting a defense for these allottees and their vendees. The proof that the United States has consented to be sued in a case of this kind is as strong and persuasive as it was in the Minnesota case. It would be strange, indeed, if the United States could, wherever and whenever the State of Kansas asserts title to the lands under its land grant, appear and defend, having the right to do so, and yet claim that it is not subject to a direct suit by the State of Kansas.

Under the Court of Claims act, as it has been interpreted, courts are not given jurisdiction to interfere with the administration of the land laws of the United States so as to enforce their specific performance, but they are clearly given jurisdiction, where the lands have passed from under their jurisdiction, through an act of the Government converting them to its own use or that of other grantees, and thus breaking the contract made by the Government's grant, in this instance to the State of Kansas.

IV.

The suggestion that "it does not appear that all the lands "in controversy have been allotted" is not correct. The bill (pp. 12, 13, and especially 16) shows that "generally speak- "ing all lands within twenty miles of the Missouri, Kansas "and Texas railway *have been allotted.*" It is because of such allotments (which have been practically completed) and

the attempted transfer to such allottees of the title of the United States, notwithstanding the prior grant of the same lands to the State, that this bill is now presented. The suggestion of the attorney general would compel a separate suit in respect of each actual allotment, a proceeding condemned by settled equity practice. Refusal to entertain the cause upon such an objection would, we submit, be most inequitable. Otherwise the State could not present its single bill until the last individual allotment had been made. That could be deferred indefinitely, and when accomplished the plea of laches against the State would as obviously be then interposed. This cause is too important in every view and upon all sides to be now withheld from judgment upon such a strained suggestion.

The suggestion in the brief of counsel for defendants that the railway company is interested in the suit of the State of Kansas and some of its counsel are attorneys of the railway company seems to us trivial. The State of Kansas, in bringing this suit in its right as trustee for its beneficiary, had the right to call upon the beneficiary for indemnity. This is the rule with reference to all trustees. A trustee is entitled to be indemnified by the beneficiary. It is a matter of common practice and manifest propriety for the beneficiary to call upon the trustee to act, and cannot in any possible view affect the jurisdiction of the court to hear and determine the cause.

The final suggestion of opposing brief is directed solely to the *merits* of the cause. No present answer is required. The grave questions involved in this controversy cannot be thus settled in a few lines of mere suggestion which ignores all discussion of the meaning and effect of the original grant *in præsenti* to the State, since fully and seasonably earned, and all reference to the legal effect of the efforts of the grantor to thereafter repudiate the grant and deliberately avoid the contract. Certainly against such wrongs and upon the full recital of all the facts as set forth in the bill the judicial power vested under the Constitution in this court to hear and

determine the controversy constitutes the very essence of due process of law. From that inquiry the United States should not shrink nor, we submit, interpose objections which seek to deny all judicial inquiry or remedy here or elsewhere.

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JOSEPH H. CHOATE.
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Of Counsel.

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JAMES H. McKENN

No. 11, Original.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE STATE OF KANSAS, COMPLAINANT,

v.

THE UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS.

DEMURRER.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE STATE OF KANSAS, COMPLAINANT,
vs.
THE UNITED STATES OF AMERICA ET AL., DEFENDANTS.
No. 11, Original.

DEMURRER.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The demurrer of William Fisher, one of the defendants herein, by James W. Zevely, James M. Givens and Edgar Smith, his solicitors, to the bill of complaint of the State of Kansas, by Chiles C. Coleman, solicitor for and Attorney General of said State of Kansas.

The defendant William Fisher, above named, demurs to complainant's bill herein and for cause of demurrer shows:

FIRST. This court has no jurisdiction of this cause,

because it appears from the face of the bill that the matters complained of do not constitute, within the meaning of the constitution of the United States, a controversy between the State of Kansas and the United States.

SECOND. Because it appears from the face of the said bill that it does not state facts sufficient to constitute a cause of action.

WHEREFORE, and for divers other good causes of demurrer to said bill, this defendant demurs thereto and prays judgment that he be not required to plead further.

JAMES W. ZEVELY,
JAM . M. GIVENS,
EDGAR SMITH,
Solicitors for William Fisher.